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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

ED C. WRIGHT, DOING BUSINESS AS ED C. WRIGHT & COMPANY, SUCCESSOR TO ED C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION,

Respondents.

PETITION FOR A REHEARING.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner, The City of Coral Gables, and presents this its Petition for a Rehearing on the Writ of Certiorari issued in the above entitled cause.

Introduction.

We will address this petition to the opinion of the Circuit Court (*Wright, et al.* v. *City of Coral Gables, Florida,*

137 F. 2d 192) since the effect of this Honorable Court's per curiam judgment affirming the judgment of the Circuit Court by an equally divided court, Mr. Justice Douglas taking no part in the consideration or decision of the case, is to leave the opinion of the Circuit Court as the final law of this case.

Prior to the decision of the circuit court in this case there had been a steady development of decisions by the several circuit courts and this Court in municipal bankruptcy proceedings. This Court had rendered only three opinions involving the Municipal Bankruptcy Act of 1937 and no opinions involving proceedings instituted under subsection 83 (j) thereof.[1] This Court has, however, in many cases denied petitions for writs of certiorari in municipal bankruptcy proceedings where the circuit courts had applied certain consistent principles of equity and bankruptcy law in reaching their conclusions. This Court's orders in denying so many petitions for writs of certiorari in so many cases of a similar nature, involving similar principles of equity and law, while not settling these principles as the law of the land, nevertheless are entitled to impelling weight. They have been relied upon by the lower courts and all parties interested in this branch of the law.

In re South Beardstown Drainage & Levee District, 7 Cir., 125 F. 2d 13.

See Addenda for list of cases.

The many taxing units in financial difficulties and their attorneys have been relying upon these principles in their refinancing operations and dealings with their creditors.

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[1] *United States* v. *Bekins*, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137; *American United Mutual Life Ins. Co.* v. *City of Avon Park*, 311 U. S. 138, 61 S. Ct. 157, 85 L. Ed. 91; *Kelly* v. *Everglades Drainage Dist.*, 319 U. S. 417, 63 S. Ct. 1142, 87 L. Ed. 1091.

The petitioner relied upon this body of apparently well established law in the conduct of its fiscal affairs and in the preparation and trial of this bankruptcy proceeding. The master and the district court applied these principles of equity and municipal bankruptcy law to their factual findings and concluded that the City had complied with the requirements of the said law, that the net practical effect of the financial transactions of the City with some of its creditors after partial completion of its refunding did not violate any of the provisions of the law and did not prejudice the rights of the objecting creditors, and that the City was entitled to the relief prayed for in its petition.

The circuit court, in its opinion, ignored the said principles of equity and municipal bankruptcy law in its consideration of the case. The only law referred to and the only citation of authorities in its opinion was in connection with its statement of the fundamental law of compositions in bankruptcy to the effect that the constitutional base on which the efficacy of consents to a composition rests "is the identity of interest of those (creditors) consenting with those compelled by the consents to accept the plan" (137 F. 2d 192, 195).

This statement of law is of course correct. The error of the circuit court in applying it to the instant case is that the court erroneously assumed that the consenting creditors in this case had become better situated than the non-consenting creditors as a result of the operations of the City for almost three years after the voluntary plan of refunding was placed in effect. As a matter of fact this assumption is contrary to the findings of the special master and the trial court, and contrary to the facts in the record as pointed out in our Brief in Support of the Writ of Certiorari on pages 43 to 51.

The effect upon the development of the law of municipal bankruptcy of this Honorable Court's affirmance of the cir-

cuit court in this case by an equally divided court is to destroy the value to all interested parties of the law developed by the circuit courts and so frequently indirectly approved by this court by its numerous denials of petitions for certiorari in other cases. To affirm the opinion of the circuit court in this case by an equally divided court leaves the municipal bankruptcy law, particularly cases filed under subsection 83 (j), in utter chaos, and taxing districts, who have partially completed refundings or who contemplate refundings under circumstances which make it more practical and effective to execute them in part prior to filing a petition in bankruptcy, cannot possibly know under the present status of reported decisions how to conduct their affairs to the best interests of the taxpayers and the overwhelming majority of creditors.

ARGUMENT.

I. The effect of the present status of this case is to defeat the purpose of Congress in enacting subsection 83(j) and to violate the provisions of subsection 83(c), limiting the jurisdiction of the bankruptcy court.

The purpose of Congress in enacting subsection 83 (j) was to give taxing units a procedure to afford them relief from a situation very clearly described in the Merced decision by a quotation from Senator Pepper's remarks on offering the amendment, as follows:

> "'Before that municipal bankruptcy law went into effect there were a number of municipalities which had engaged in a partial refunding, or, rather, had inaugurated a refunding program, which had been partially completed, but, in the absence of any laws to aid them, they were completely at the mercy of a recalcitrant minority of their obligees as to whether or not that refunding plan could succeed.
>
> "'A very few bondholders could prevent the accomplishment of the whole refunding program, no matter

if 98 percent of the obligees might desire that it go into effect.' "

West Coast Life Ins. Co. v. *Merced Irr. Dist.*, 114 F. 2d 654, certiorari denied, 311 U. S. 718, 85 L. Ed. 467, 61 Sup. Ct. 441.

The Court will take judicial cognizance of the fact that a municipality which had partially completed a plan of refunding, but which had a recalcitrant minority of creditors who were threatening the success of the plan, must necessarily have financial transactions with those recalcitrant creditors.

The Court will also take judicial cognizance of the fact that recalcitrant creditors who were endangering the success of a plan of refunding could do so only by taking steps to enforce the payment of their obligations according to their rights under the law. That is exactly what took place in the Coral Gables situation and the financial transactions which it had with its recalcitrant creditors were the normal necessary transactions to preserve the City's credit and the success of its partial refunding. Practically all of these transactions which are complained of by the respondents were completed before subsection 83 (j) became effective on September 22, 1938 (R. 1521-29). The conduct of the recalcitrant creditors, respondents Wright and the American National Bank, as described on pages 18 to 23 of our Brief in Support of the Writ of Certiorari, was endangering the success of the petitioner's refunding and the City resorted to subsection 83 (j) and instituted this proceeding.

This subsection 83 (j) has been held effective to meet and provide a remedy for the situation described in the above quotation from the Merced decision.

West Coast Life Ins. Co. v. *Merced Irr. Dist., supra;*
American National Bank of Nashville, Tennessee v. *City of Sanford, Florida*, 5 Cir., 112 F. 2d 435, certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 S. C. 45.

The conclusion of the circuit court in its opinion in this case is apparently premised upon the idea that the financial transactions of the City in purchasing from some of its creditors the old bonds and coupons and judgments on the same, which were made between October 18, 1937, and December 15, 1938 (R. 1521-9), constituted a violation of the rights of the respondents, and as a matter of law constituted an abandonment of its plan of refunding. The effect of this decision is to deny to this petitioner a right specifically reserved to it and declared to be beyond the jurisdiction of the bankruptcy court.

The municipal bankruptcy act specifically provides in subsection 83 (c) that the court "shall not, by any order or decree, in the proceeding or otherwise, interfere with (a) any of the political or governmental powers of the petitioner; or (b) any of the property or revenues of the petitioner necessary for essential governmental purposes; or * * *". The purchase of these securities and judgments on securities by the petitioner were made in an attempt to prevent harmful tax rates and a disruption of a refunding program, and for the purpose of preserving and improving the future tax collecting power of the City, and for the further purpose of anticipating the requirements of section 12 of the plan (R. 848). These transactions were the exercise by the petitioner of its governmental powers in the handling of property and revenues, not pledged to the servicing of refunding securities, for essential governmental purposes. The effect of the circuit court opinion is that this petitioner, which had exercised its political and governmental powers in dealing with its property and revenues for the accomplishment of an essential governmental purpose, is denied the benefits and protection of the municipal bankruptcy law, because it had so exercised such powers. This is a most effective violation by the court of

this important essential limitation upon its jurisdiction in municipal bankruptcy cases. Certainly subsection 83(j) was not intended to amend the above quoted provisions in subsection 83 (c).

In other municipal bankruptcy cases the circuit courts have held that similar uses of the properties and revenues of a taxing unit were not sufficient grounds to justify a refusal to confirm a plan of composition.

West Coast Life Ins. Co. v. *Merced Irr. Dist., supra.*

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. 2d 922, certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 Sup. Ct. 59.

II. The opinion of the circuit court in this case ignores and by inference reverses numerous principles of equity and municipal bankruptcy law announced in other decisions, which should have been applied to the facts in this case.

1. The municipal bankruptcy act places on a basis of equality all creditors existing at the time of filing the petition in bankruptcy whose claims are payable from the same source.

Taylor v. *Provident Irr. Dist.*, 9 Cir., 123 F. 2d 965, certiorari denied, 315 U. S. 821, 86 L. Ed. 1217, 62 Sup. Ct. 914.

2. The preferential payment of a creditor made more than a year prior to the filing of a petition under the municipal bankruptcy law is not a ground for denying to the petitioner a confirmation of its plan of composition.

Thomas v. *El Dorado Irr. Dist.*, 9 Cir., 126 F. 2d 922, certiorari denied, 317 U. S. 660, 87 L. Ed. 42, 63 Sup. Ct. 59.

3. A plan of composition does not have to equalize payments on account of interest made, prior to placing the plan in effect, to some creditors and not made to others.

Getz v. *Edinburg C. I. School Dist.*, 5 Cir., 101 F. 2d 734.

4. A plan of composition approved by the trial court should not be defeated by the unsound and extremely technical contentions of a recalcitrant minority which has at all times sought to obstruct the completion of the plan and which apparently would not be satisfied with any plan which did not offer them one hundred cents on the dollar plus interest for their obligations.

Ouerbacker v. *Henderson County*, 4 Cir., 126 F. 2d 309, certiorari denied, 317 U. S. 654, 87 L. Ed. 40, 63 Sup. Ct. 51;

Thomas v. *El Dorado Irr. Dist., supra;*

Roberts v. *Board of Public Instruction of Broward Co., Florida*, 5 Cir., 117 F. 2d 943, certiorari denied, 313 U. S. 582, 85 L. Ed. 1539, 61 Sup. Ct. 1101.

5. An objecting creditor in a municipal bankruptcy proceeding must show prejudicial injury to his rights resulting from an error in an order of the trial court appealed from and not mere academic error in the order before the error should be considered by the appellate court as a ground or reason for reversing the order.

Ouerbacker v. *Henderson County, supra;*

McDonald v. *Banta Carbona Irr. Dist.*, 9 Cir., 123 F. 2d 968, certiorari denied, 316 U. S. 668, 86 L. Ed. 1743, 62 Sup. Ct. 1034;

Gentry v. *City of Fort Lauderdale*, 5 Cir., 125 F. 2d 52;

Thomas v. *El Dorado Irr. Dist., supra.*

6. Preferences prohibited by the municipal bankruptcy law are those which result from specific provisions in the plan of composition itself, or from the position of a creditor because of special contracts with the petitioning city, or from the particular situation of the creditor with reference to the petitioning city, and which exist between the consenting and the objecting creditors.

American National Bank of Nashville, Tennessee v. *City of Sanford, Florida*, 5 Cir., 112 F. 2d 435, certiorari denied, 311 U. S. 677, 85 L. Ed. 436, 61 Sup. Ct. 45;

Kaufman County Levee Impr. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. 2d 959;

Town of Belleair, Fla. v. *Groves*, 5 Cir., 132 F. 2d 542, certiorari denied, 318 U. S. 769, 87 L. Ed. 623, 63 Sup. Ct. 762.

7. Preferences between former creditors of the City who are not parties to the bankruptcy proceeding in any capacity and objecting creditors do not affect the cit's right to a confirmation of its plan of composition.

Thomas v. *El Dorado Irr. Dist., supra;*
Taylor v. *Provident Irr. Dist., supra;*
Getz v. *Edinburg C. I. School Dist., supra.*

In this case the City is contending for the use of well recognized principles of equity and bankruptcy law in the application of subsection 83(j) to the factual picture of the debtor city. It is insisting that the "net practical effect" of the financial transactions of the City, beginning shortly after the voluntary refunding of over 90 percent of its debts, shall be looked to to determine whether the objecting creditors' constitutional rights have been violated and whether their efforts to defeat the confirmation of the plan of composition should be successful. We are asking the

Court to view the factual picture in this case in the same manner in which the court in the case of *Anderson* v. *Abbott, No. 3, October Term, 1943, decided March 6, 1944*, viewed the net practical effect of the factual picture of the organization of the Banco Kentucky Company.

The opinion by Mr. Justice Douglas in that case, in order to give effect to a clearly defined legislative policy, considered not the technical legal effect of the organization of the Banco Company and the banks involved, but the net practical effect of the organization and management of Banco in relation to the well defined legislative policy to give to depositors in the national banks the protection of the double liability of stockholders in the event of failure of the banks.

In the instant case the decision of the circuit court amounts to judicial interference with the clearly shown legislative policy set out in subsection 83(j). This decision defeats this policy by failing and refusing to examine the net practical effect and result of the City's financial transactions as they relate to the rights and benefits of the objecting and consenting creditors, and by failing and refusing to apply to the factual picture of this case the above mentioned well recognized principles of equity and municipal bankruptcy law.

The trial court applied the above stated principles of equity and municipal bankruptcy law in its decision of this case. This Court by its numerous judgments denying petitions for writs of certiorari has expressed its approval of the said principles in numerous cases. The circuit court, however, ignored the said principles in deciding this case against the Petitioner. The judgment of this Court affirming the circuit court casts a cloud of doubt upon these principles of equity and municipal bankruptcy law.

We respectfully petition this Honorable Court to rehear

this case and to apply these principles to the factual picture of the case, as was done by the trial court.

III. We respectfully submit that Mr. Justice Douglas should have participated in a consideration and decision of this case, as there is no valid reason for him to disqualify himself and no party to the case could legally recuse him.

Early in the argument of this case Mr. Justice Douglas asked counsel for the City whether the Barker Committee, mentioned in the record of this case, was the same Barker Committee which had in 1935 been the subject of investigation by the Securities and Exchange Commission. Counsel advised the Court that it was the same Barker Committee but that there was involved in this case no issue of fact or law which had been the subject matter of the investigation by the Securities and Exchange Commission. The argument proceeded and no further mention of the said Commission's investigation of said Committee was made.

The Petitioner did not know that Mr. Justice Douglas would not participate in the decision of the case until the judgment of the Court was rendered, and does not now know why he did not participate.

We can only assume that Mr. Justice Douglas thought that his connection with the investigation of the Barker Committee and well over a hundred other similar committees in 1935 for some reason disqualified him from participating in the decision of this case. As a member of said Commission he was the Director of the Protective Committee Study and headed this study and investigation. The study and report was "concerned • • • with protective committees, their personnel and practices in connection with the readjustment of municipal and quasi-municipal debts" (page 14 of Report). It dealt with the history, from about 1930 to 1935, of the organization, functioning and

practices of such committees and their relation to the serious and important problem of municipal debt readjustment. The report made numerous general tentative recommendations to Congress and deferred specific legislative recommendations until the decision of this Honorable Court should be rendered in the case of *Cameron County Water Improvement District* v. *Ashton* (298 U. S. 513), involving the constitutionality of the 1934 Municipal Bankruptcy Act.

> Securities and Exchange Commission—Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees—Part IV—Committees for the Holders of Municipal and Quasi-Municipal Obligations—April 30, 1936. (Nine copies of this Report are being filed with the Clerk for distribution to the Court.)

Some of the same facts regarding the Barker Committee as those disclosed in said investigation, are in the record of this case as a part of the history of the financial problems and difficulties of the Petitioner prior to the partial completion of its plan of refunding. The factual issues presented in this case arise out of transactions of the City which transpired after the partial execution of the plan of refunding in September, 1937 with the Barker Committee and other creditors. The legal questions involve the Municipal Bankruptcy Law of 1937 and amendments thereto, and the legal effect of said transactions of the City with creditors other than the Barker Committee.

The circuit court in its opinion did not mention the Barker Committee and did not decide any issue of law or fact involving the Barker Committee or arising out of the Barker Committee's participation in the voluntary portion of the City's refunding.

The Barker Committee as a committee, and the members thereof as individuals are not parties to this cause in any capacity.

In the lower court it was contended that the fact that substantial payments on account of interest had been made to the Barker Committee for the benefit of its depositors prior to placing the plan of refunding in effect, coupled with the fact that the plan did not provide for equalizing these interest payments with creditors who had never deposited their bonds with the Barker Committee, constituted a discrimination on the face of the plan in favor of the creditors who had deposited their bonds with the Committee. On pages 49 and 50 of Brief of Petitioner we explained that, as a matter of law, such as equalization of payments on account of interest is not required and, as a matter of fact, such an equalization of prior payments cannot be an issue in this case because the Respondents do not claim as much refundable interest on their bonds as was claimed by and refunded with the Barker Committee.

It is the duty of a judge to exercise the judicial functions duly conferred upon him by law, and he has no right to disqualify himself in the absence of a valid reason, or when no party to the case could legally refuse him.

33 C. J. 1014 Judges Sec. 176.

Saunders v. *Piggly Wiggly Corp.*, 1 F. 2d 582.

We respectfully insist that under the above circumstances there is no justifiable reason for Mr. Justice Douglas to decline to participate in the decision of this case, and we respectfully petition him to reconsider his action in this matter and to participate in the consideration of this petition and the ultimate decision of this case.

Conclusion.

Wherefore, the Petitioner respectfully prays the Court to grant it a rehearing in this case, and respectfully prays that Mr. Justice Douglas reconsider his decision not to participate in the decision of the case. It is of the greatest

importance to this Petitioner and to all of the numerous financially distressed taxing agencies of the United States that the principles of municipal bankruptcy law, heretofore inferentially established by this Court's denial of petitions for writs of certiorari, and hereinabove referred to, should be directly passed upon by this Honorable Court. The importance of this case and the issues involved would seem to require the granting of a rehearing and the re-argument of the case at this Honorable Court's earliest convenience.

Motion for Stay Order.

Comes now the Petitioner, by its undersigned attorneys, and moves the Court for an Order staying the mandate in this cause until the foregoing Petition for a Rehearing has been acted upon by the Court.

Dated, Miami, Florida, March 30, 1944.

Respectfully submitted,

MORTON B. ADAMS,
IRA C. HAYCOCK,
D. H. REDFEARN,
Attorneys for the City of Coral Gables.

Certificate.

We, the undersigned attorneys for the Petitioner, declare that the foregoing Petition for a Rehearing is submitted in good faith and is not interposed for delay.

Dated, Miami, Florida, March 30, 1944.

MORTON B. ADAMS,
IRA C. HAYCOCK,
D. H. REDFEARN,
Attorneys for Petitioner.

ADDENDA.

List of Cases Where Certiorari Denied.

Harry C. Davis, et al. v. *City of Homestead, Fla.*, 112 Fed. 2d 438, 311 U. S. 678, 61 S. Ct. 45.

American Nat'l Bank of Nashville, Tenn., v. *City of Sanford, Fla.*, 112 Fed. 2d 435, 311 U. S. 677, 727, 61 S. Ct. 45, 132.

Vallette, et al. v. *City of Vero Beach, Fla.*, 104 Fed. 2d 59, 308 U. S. 586, 60 St. Ct. 110.

Getz v. *Edinburg Consolidated Indep. School Dist.*, 101 Fed. 2nd 734, 60 S. Ct. 63.

Luehrman v. *Drainage District No. 7*, 104 Fed. 2d 696, 60 S. Ct. 141, 260.

Bekins v. *Lindsay-Strathmore Irr. Dist.*, 114 Fed. 2d 680, 61 S. Ct. 712, 805.

West Coast Life Ins. Co. v. *Merced Irr. Dist.*, 114 Fed. 2d 654, 61 S. Ct. 441, 620.

Moody v. *James Irr. District*, 114 Fed. 2d 685, 61 S. Ct. 712.

Newhouse v. *Cochran Irr. Dist.*, 114 Fed. 2d 690, 61 S. Ct. 440, 620.

Jordan v. *Palo Verde Irr. Dist.*, 114 Fed. 2d 691, 61 S. Ct. 712, 805.

Mission Ind. School Dist. v. *State of Texas*, 116 Fed. 2d 175, 61 St. Ct. 839.

Albert Roberts, Jr., v. *Board of Pub. Inst. for County of Broward, State of Florida*, 117 Fed. 2d 943, 61 S. Ct. 1101.

Taylor v. *Provident Irr. Dist.*, 123 Fed. 2d 965, 62 S. Ct. 914.

McDonald v. *Banta Carbona Irr. Dist.*, 123 Fed. 2d 968, 62 S. Ct. 1034.

Town of Belleair, Fla. v. *Groves*, 132 Fed. 2d 542, 318 U. S. 769, 63 S. Ct. 762.

Ouerbacker v. *Henderson County*, 126 Fed. 2d 309, 317 U. S. 654, 63 S. Ct. 51.

Thomas v. *El Dorado Irr. Dist.*, 126 Fed. 2d 922, 317 U. S. 660, 63 S. Ct. 59.

Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist.*, 9th Cir., 136 F. 2d 539. (Certiorari denied March 27, 1944.)